Nos. 83-321 & 83-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GUY WALLER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

CLARENCE COLE, *et al.*,

Petitioners,

v.

STATE OF GEORGIA,

Respondent.

On Writs of Certiorari to the Supreme Court of the State of Georgia

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QUESTIONS PRESENTED

1. May a suppression hearing be closed, over the objection of the accused, to protect the "privacy" rights of parties to telephone conversations that the police have recorded and intend to use to "validate" the gathering of other evidence, where (a) the privacy interests said to be at stake in the case are not found to be substantial, (b) no attempt is made to protect those interests by means short of closure, and (c) closure is ordered not simply while the tapes are played, but for the entire suppression hearing?

2. Does Georgia Code § 16-14-7(f) violate the Fourth and Fourteenth Amendments by authorizing a law enforcement officer to seize, without prior judicial approval and without notice or hearing, any private property that "the officer has probable cause to believe . . . is subject to forfeiture" in civil proceedings, where (a) by definition, nothing about such property could disclose that it *is* "subject to forfeiture," and (b) the statute defines potentially everything in a person's home as the fruit, instrumentality, or evidence of a crime?

3. When law enforcement officers, having obtained entry on the basis of a facially valid search warrant, conduct a general search of a person's home and a wholesale seizure of his possessions in flat disregard of the scope of the warrant and of the Fourth Amendment's probable cause and particularity requirements, may the State use any of the fruits of the search against that person in a criminal trial?

PARTIES BELOW

Appellants below, petitioners herein, were Guy Waller, who is the petitioner in No. 83-321, and Clarence Cole, Eula Burke, W. B. Burke, and Archie Thompson, who are the petitioners in No. 83-322. Appellee below, respondent herein, was the State of Georgia.

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BRIEF FOR PETITIONERS

Pursuant to Rule 34 of the Rules of this Court, petitioners in Nos. 83-321 & 83-322 respectfully submit this joint brief.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at 251 Ga. 124, 303 S.E.2d 437, and appears at pages 20a-28a

of the Joint Appendix ("J.A."). That court's order denying rehearing is reprinted at J.A.29a.[1]

The trial court's order granting the State's closure motion was oral and unreported; the portions of the transcript of the hearing in which the trial court granted the motion are reprinted at J.A.13a-18a. The trial court's order with respect to petitioners' suppression motion is unreported, and appears at J.A.19a.

JURISDICTION

The decision of the Georgia Supreme Court, which constitutes its judgment, was entered on June 1, 1983. (J.A.20a.) A timely-filed petition for rehearing was denied on June 28, 1983. (J.A.29a.) Petitions seeking review of the decision were timely filed on August 26, 1983, and certiorari was granted and the cases consolidated on November 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The First, Fourth, Sixth, and Fourteenth Amendments to the Constitution, and Georgia Code §§ 16-11-64(b)(8) and 16-14-7(a) & (f), are set out at J.A.1a-2a.

STATEMENT OF THE CASE

A. Nature of the Case

In early January 1982 local law enforcement officials in Georgia, armed with search warrants authorizing seizure of various specified items of "tangible evidence of the crimes of commercial gambling, communicating gambling information

[1] The decision below is cited to its report in S.E.2d, as well as to the Joint Appendix. As used herein, "S.T." refers to the transcript of the suppression hearing and "T." refers to the trial transcript.

and keeping a gambling house," swept through more than 150 homes in 12 counties across the State, including the homes of the petitioners.[2]

Despite the limited scope of the warrants, the law enforcement officers, in the words of the trial court, "just went in and took everything that was in sight." (S.T.638.) Among the things seized were gas and electric bills, jewelry, cemetery deeds, love letters, children's drawings, Christmas, Valentine's Day, and Easter cards, school report cards, wedding portraits, group family photographs, credit reports, bounced checks, credit applications and rejections, unopened strongboxes, as well as other non-contraband items not included in the search warrants. In the course of their raids, police managed to seize a blind man's rent money (T.640-42, 1778-80), the money of relatives in town from Detroit for a funeral (T.455-58), envelopes for contributions to the Rev. Billy Graham (T.579), and a booklet advertising incense and candles. (T.752.) Over 250 boxes of materials were seized.[3]

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[2] The warrants authorized seizure of

> "money; betting slips; lottery ribbons; lists of bettors; documents containing information related to gambling; computers and other information storage and retrieval devices; telecopiers and other facsimile reproduction devices; telephones and other related communication devices; radio frequency scanners and other radio communication devices, which things are subject to search and seizure as tangible evidence of the crimes of commercial gambling, communicating gambling information and keeping a gambling place . . . ."

See, *e.g.*, Warrant for Search and Seizure respecting petitioner Cole, State's Ex. 23, Ex. Vol. VI, p. 2523. The warrant appears at J.A.4a-5a.

[3] As Special Agent Smith of the Georgia Bureau of Investigation acknowledged at trial, those conducting the search picked up everything they could, "to be sorted out [later] by the people that was [*sic*] familiar with it." (T.624.) Agent Smith acknowledged that he could not make any on-the-spot determination as to whether the property he seized was "private" because "I really didn't know the names of the people involved and the ones that are not." (*Id.*) Asked whether he had "any way of knowing" whether the property he seized had anything to do with the suspected gambling activities, Agent Smith testified that he "was picking it up in the event that it had. Now if when it was sorted out it wasn't, it could all be returned." (T.629.)

(footnote continues)

The raids were part of what the State has described as "a multi-county attack on . . . organized gambling" in Georgia. (S.T.28.) The raids led to the return of an indictment by a Fulton County grand jury on February 9, 1982. Despite the invasion of privacy of more than 150 homes, the indictment charged only the petitioners and 35 others with violations of the Georgia Racketeer Influenced and Corrupt Organizations ("RICO") Act, O.C.G.A. §§ 16-14-1 to 16-14-15, and with commercial gambling and communicating gambling information under O.C.G.A. §§ 16-12-22 and 16-12-28.

The indictment followed an extensive, eight-month program of electronic surveillance during which more than 40 telephone lines were tapped pursuant to investigatory warrants, and more than 800 hours of telephone conversations recorded. County authorities immediately commenced a series of parallel civil proceedings to transfer to the State property seized during the raids, pursuant to the Georgia RICO statute's provisions for proceedings for forfeiture of "[a]ll property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity." O.C.G.A. § 16-14-7(a).

Trial in the criminal case commenced on June 21, 1982.[4] A jury was empanelled and then excused while the trial court

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(footnote continued)

The trial transcript discloses that officers executing the search warrants made a conscious decision to seize property indiscriminately, without regard to whether such property fell within the scope of the warrants, because "we had a storm coming in on us and it was either do what we could . . . and get out of there or we would have had to camp out with Mr. Waller three or four days." (T.630; see T.386.) As one officer explained, private papers were indiscriminately seized because "I didn't feel I should stay there . . . and identify each individual piece of paper." (T.1162.)

According to one defense witness subject to the raids, the police "went through my house worse than a tornado would. Now, they didn't read nothing to me, whether they had a search warrant or what not. They didn't say nothing but go around there and sit down and be quiet." (T.1777.)

[4] Petitioners and 13 others were tried separately from the rest of those indicted, having demanded a speedy trial pursuant to O.C.G.A. § 17-7-170(a). Three of those 13 were granted directed verdicts of acquittal. (T.1759-61.) The remaining defendants asked for and received continuances (T.10-85), or pleaded to lesser offenses.

conducted a closed hearing on petitioners' suppression motion and other matters. (T.239.) The hearing lasted seven days, following which the case was tried to the jury. After nearly three days of deliberation, the jury returned a verdict acquitting five of the defendants on all counts. The jury acquitted the others, including the petitioners, of the RICO count, but convicted each of them of commercial gambling and communicating gambling information. (T.2098.)[5]

Of the petitioners here, Eula Burke was sentenced to five years' probation and ordered to pay a $10,000 fine; W.B. Burke was sentenced to two years' imprisonment and three years' probation and ordered to pay a $15,000 fine; and Clarence Cole, Archie Thompson, and Guy Waller were each sentenced to three years' imprisonment and two years' probation and ordered to pay a $20,000 fine. (T.2154-57.) Petitioners are free on bond pending appeal.

B. The Orders at Issue

The questions before this Court arise from two orders entered by the trial court on preliminary motions, and upheld by the Georgia Supreme Court: the trial court's order granting the State's motion to close the suppression hearing, and its order partly overruling defendants' motions to suppress all evidence seized during the January raids.

1. The Closure Order

On June 14, 1982, the State filed a written motion requesting that "any hearing" on defendants' motions to suppress "be closed to the public." (J.A.7a.) As justification, the State's motion asserted only that, in order to "validate" the seizure of certain electronically gathered evidence and certain other evidence, the State was required to use wiretap evidence "which may involve a reasonable expectation of privacy of persons other than those indicated in the above-styled case." (J.A.6a,

[5] With respect to the civil RICO forfeiture proceedings involving property of the petitioners, all of the petitioners have settled with the State, and, pursuant to those settlements, have received much, but not all, of their property back.

¶ 3.) The State asserted that use in open court of its wiretap evidence might be deemed an "unnecessary publication" (J.A.13a) within the meaning of O.C.G.A. § 16-11-64(b)(8), thus, in the State's view, precluding use of such evidence against other persons "not presently on trial." (J.A.13a.).[6] The State did not specifically identify or describe the wiretap evidence it proposed to offer, attempt to justify its claim that use of the evidence was necessary to its case, or explain why closure of the entire hearing was necessary.

Over the vigorous objection of defendants that closure would violate their constitutional right to a public trial (J.A.15a),[7] the trial court directed that the entire suppression hearing be closed to the public and the press. "[E]verybody must go," the trial court ruled, "except the defendants, counsel, and necessary witnesses of course who appear and the officers of the court." (J.A.17a.) The trial court ordered closure solely on the basis of O.C.G.A. § 16-1164(b)(8).

Less than two-and-one-half hours of the seven-day suppression hearing were devoted to playing tapes of intercepted telephone conversations, and the few recorded conversations actually played at the hearing were introduced and analyzed by only one witness. (S.T.366-477.)[8] The remainder of the hearing was devoted to the testimony of nearly 20 witnesses, mainly concerning the procedures utilized in obtaining and executing the search warrants and wiretap authorizations (see, *e.g.*, S.T.202-48), and the procedures followed in

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[6] O.C.G.A. § 16-11-64(b)(8) provides:

> "Any publication of the information or evidence obtained under a warrant issued hereunder other than that necessary and essential to the preparation of and actual prosecution for the crime specified in the warrant shall be an unlawful invasion of privacy under this Chapter, and shall cause such evidence and information to be inadmissible in any criminal prosecution."

[7] Unlike the others, petitioner Cole "concurred" in the State's motion to close the suppression hearing (J.A.14a), and did not seek review of the closure order below.

[8] The parties to the intercepted conversations included no one who had not been named in the indictment, and a review of the record reveals that only one person who had not been indicted was even mentioned in the recorded calls. (S.T.475.)

conducting the surveillance and in preparing and preserving the resulting tape recordings. (See, *e.g.*, S.T. 298-307, 575-83.) The hearing also focused on such issues as whether the police had afforded others unlawful access to evidence seized in the raids, and whether the prosecution and police had engaged in misconduct in negotiations with two of the defendants. (*E.g.*, S.T.741-45, 815-20.) [9] Transcripts of the entire hearing, including transcripts of the recorded conversations played behind the closed courtroom doors, were later made public—before the other defendants named in the indictment were brought to trial.

On appeal, the Georgia Supreme Court expressly declined to decide whether O.C.G.A. § 16-11-64(b)(8) "required that the wiretap information be revealed only in a closed courtroom," but nonetheless upheld the trial court's closure order over petitioners' constitutional challenge. (J.A.23a, 303 S.E.2d at 441.) The state supreme court, commenting that "information was revealed which was potentially harmful to others, would tend to violate the privacy of others, and might prejudice other potential defendants" (*id.*), held that the trial court had permissibly "balanced appellants' rights to a public hearing against the privacy rights of others." (*Id.*) The Georgia Supreme Court concluded that this was a proper exercise of the trial court's "inherent power '. . . to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice' " *Id.*, quoting *Lowe* v. *State*, 141 Ga. App. 433, 435, 233 S.E.2d 807, 809 (Ga. Ct. App. 1977).

2. The Suppression Order

On June 21, 1982, defendants moved for suppression of all wire or oral communications intercepted by the State and of all fruits thereof, and "any physical evidence seized during the execution of any search warrants issued subsequent to the

[9] Those testifying included not only the police officers who secured the warrants and conducted the surveillance and the telephone company official who assisted them (S.T.182202), but the prosecutor who prepared the warrants and underlying affidavits, and the local judge who authorized the warrants. (*E.g.*, S.T.106-79, 592-601.)

interception of Defendants' conversations and/or flowing therefrom." (J.A.8a.) Defendants further sought an order "proscribing the use of all such evidence, directly or indirectly," in any proceeding other than the suppression hearing. (*Id.*) Among other things, defendants argued that "[t]he physical searches and seizures . . . were exploratory and general and eventuated in indiscriminate seizures of property not authorized to be seized, including the private papers of the Defendants." (J.A.11a-12a, ¶ 22.)

Defendants specifically argued that the searches and seizures could not be defended on the basis of O.C.G.A. § 16-14-7(f) because the statute, in violation of the Fourth and Fourteenth Amendments to the Constitution, authorizes "unbridled seizures by the officers conducting the search without the interposition of judicial control or restraint." (J.A. 12a, ¶ 23.) In pertinent part, Section 16-14-7(f) provides that seizure of property subject to forfeiture to the State in civil RICO proceedings

> "may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to a lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized." [10]

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[10] Georgia's RICO statute, Ga. L. 1980, p. 405, § 1, provides for civil *in rem* actions for forfeiture to the State of "[a]ll property of every kind used or intended for use in the course of, derived from or realized through a pattern of racketeering activity." O.C.G.A. § 16-14-7(a). Such proceedings are instituted by complaint and prosecuted by the district attorney of the county in which the property is located or seized. *Id.* § 16-14-7(d). In addition to Section 16-14-7(f)'s provision for seizure without prior judicial approval, the statute provides that, after a complaint has been filed, the court may order property seized by issuing a writ of seizure with or without notice, depending on whether there is reasonable cause to believe that prior notice would result in the loss or destruction of the property. *Id.* Any person claiming an interest in the property may become a party to the action, *id.* § 16-14-7(h)(1), and the proceedings are to be conducted as provided by the Georgia Civil Practice Act. *Id.* § 16-14-7(i). Any party may demand a jury trial. *Id.* The Georgia statute's provision for seizure without prior judicial approval has no counterpart under the federal RICO statute, 28 U.S.C. §§ 1961-1968. See page 25, note 33, below.

Defendants contended that, because the early January raids involved general searches and wholesale seizures in violation of the Fourth Amendment's probable cause and particularity requirements, all of the evidence seized—including evidence within the literal scope of the warrants—must be excluded. (S.T.603-40.) They argued that "the intrusiveness of the search [was] so . . . egregious" (S.T.623) that "everything should be suppressed." (S.T.632.) The authorities, defense counsel stated, "should have known that they were dead wrong to seize it and to do so in the face of that taints everything and everything should go out." (S.T.632.)

The State, without conceding that *any* of the evidence seized was beyond the scope of the search warrants (S.T.612-14), indicated its willingness to accede to an order suppressing the use of what it characterized as "personal or . . . arguably personal evidence" (S.T.603), explaining that it did not intend to use that evidence at trial, and was ready to return it to the defendants. (*Id.*) The trial court, stating that such "personal" evidence "is not admissible" (S.T.635), entered an order on June 29 suppressing that evidence, but overruling defendants' motion to suppress any other evidence beyond the scope of the warrants. (J.A.19a.)

The trial court refused to pass on the validity of the search warrants or the conduct of the search and seizure, declaring simply: "I'm not interested in this search warrant, whether it is a good search or a bad search." (S.T.311.) The court stated that it was interested only in whether the electronic surveillance that led to the issuance of the search warrants was proper. As the court explained, "all this business of whether [the warrants were] executed right and all that kind of thing I ain't concerned about." (S.T.314.) "I ain't gonna try no search warrant," the court stated, "I ain't gonna do it." (*Id.*) [11]

[11] The trial court thus did not order the exclusion of any evidence characterized by the State as "lottery evidence" or "RICO" evidence (see S.T.607), refusing to consider whether such evidence was beyond the scope of the warrants, or whether the warrants were valid. The trial court excluded only that evidence which the State, having decided not to use it, had been willing to characterize as "personal," and it did so without explaining why such evidence would be "inadmissible."

On appeal, the Georgia Supreme Court, on the authority of O.C.G.A. § 16-14-7(f), upheld the trial court's refusal to suppress trial evidence which had been seized in the raids, first holding the statute constitutional on its face, and then holding the statute constitutional "as applied" to petitioners. In effect construing Section 16-14-7(f) as a gloss on any search or arrest warrant obtained by the police, the court sustained the statute as facially valid because it authorizes seizures only pursuant to "a lawful arrest, search, or inspection." (J.A.21a, 303 S.E.2d at 440.) The court concluded that this limitation renders Section 16-14-7(f) consistent with the Fourth Amendment "by definition." (*Id.*) Without explanation, the court dismissed petitioners' contention that, by authorizing seizure, without prior judicial approval, of lawfully held private property, Section 16-14-7(f) violates the Due Process Clause of the Fourteenth Amendment. (*Id.*)

The court held that the statute had been constitutionally "applied" to the petitioners on the ground that "[s]uch items as were unlawfully seized were excluded." (J.A. 21a, 303 S.E.2d at 440.)[12] It added that "[t]here is no requirement that where evidence has been lawfully seized it must be suppressed if officers unlawfully seized other materials, unless the unlawfully seized evidence led to the discovery of the evidence which was admitted." (J.A.22a, 303 S.E.2d at 440.) The court therefore affirmed petitioners' convictions.

SUMMARY OF ARGUMENT

1. In this case the Court is called upon to hold applicable to suppression hearings the Sixth and First Amendment guarantees of openness applicable to criminal trials. Suppression hearings have traditionally been public; moreover, such hearings critically focus on the manner in which the criminal justice system operates, and may be the most crucial phase in a criminal case. The Constitution's guarantees of openness should therefore apply to such hearings—whether conducted after "the trial" formally commences, as here, or before. Such

[12] But see page 9 & note 11, above.

hearings should be subject to closure only upon a finding of compelling justification and unavoidable necessity.

The closure order entered in this case fell far short of that standard. Closure here was ordered, over the objection of the accused, to protect the State's interest in possible future prosecutions—prosecutions that the State insisted would be jeopardized under state law if it were permitted, during the suppression hearing, to play certain wiretap evidence only in open court. Under state law, "unnecessary publication" of wiretap evidence may be an "invasion of privacy"; here, the State claimed, "publication" might have precluded it from using such evidence in prosecutions of others "not presently on trial." The Georgia Supreme Court, without deciding whether state law required the wiretap evidence to be presented behind closed courtroom doors, held that the closure order entered by the trial court permissibly "balanced [petitioners'] rights to a public hearing against the privacy rights of others."

But any "balance" struck by the trial court here was wholly indefensible. The trial court made no finding that the privacy interests at stake in this case were substantial enough to warrant closure, or that means short of closure were unavailable to protect such interests. Indeed, transcripts of the suppression hearing, including transcripts of the State's wiretap evidence, were made public soon after the hearing. Even if such findings could have been made on the record here, the order entered below was utterly unjustifiable, for the trial court ordered the entire suppression hearing closed, and not simply those portions of the hearing during which the State proposed to play its tapes.

2. Also at issue in this case is a State's attempt to authorize, and to carry out, wholesale seizures of private property that police officers, in their sole discretion, deem to be "subject to forfeiture" under the State's RICO statute. Such property is so broadly defined as to include "all property, of whatever nature and no matter how inoffensive, if it is acquired with racketeering proceeds."[13] Because nothing about "property subject to forfeiture" marks it as having been acquired with

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[13] *Western Business Systems, Inc.* v. *Slaton*, 492 F. Supp. 513, 514 (N.D. Ga. 1980).

such proceeds, police officers are incapable of making sufficiently meaningful probable cause determinations to permit seizure of such property without prior judicial approval. Absent exigent circumstances not present in this case, due process would in any event preclude seizure of such forfeitable property without prior notice and hearing. In seeking to expand the narrow exceptions to the warrant requirement recognized in this Court's precedents, and in circumventing settled due process safeguards, the State in this case has gone farther than the Constitution allows.

3. Wholly apart from the state statute here at issue, the searches and seizures conducted here plainly violated the Fourth Amendment. The police treated the warrants under which they acted as license to perform indiscriminate searches of more than 150 homes, and wholesale seizures of personal papers and effects—notwithstanding the Fourth Amendment's requirements of particularity and probable cause. Yet the trial court flatly refused to pass on petitioners' challenges to the validity of the warrants, and to the searches and seizures performed pursuant to them; the Georgia Supreme Court similarly refused to face the issue. In these circumstances, where the police have "launch[ed] upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant,"[14] all of the fruit of such searches should have been suppressed.

ARGUMENT

I. Closure of the Suppression Hearing Violated the Sixth and First Amendments.

A. The Sixth Amendment Guarantees the Right to Open Suppression Hearings.

" 'Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.' " *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring in

[14] *Stanley* v. *Georgia*, 394 U.S. 557, 572 (1969) (Stewart, J., concurring in result).

judgment), *quoting* L. Brandeis, *Other People's Money* 62 (1933). Accordingly, no feature of the American criminal justice system is more prominent or secure than the practice of conducting criminal trials in public. It is a right guaranteed to criminal defendants by express command of the Sixth Amendment, applicable to the States through the Fourteenth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." See *Gannett Co., Inc.* v. *DePasquale,* 443 U.S. 368, 379-81 (1979).[15]

Although this Court has not yet specifically faced the issue, it is clear that the defendant's Sixth Amendment right to public trial should be held to encompass suppression hearings such as the one closed by the trial court in this case.[16] To begin with, this hearing fell literally within the confines of the "trial." The trial had actually begun when the courtroom doors were closed, for the jury had been empanelled and the "issue" had been "joined." (T. 106.)[17]

Regardless of when the suppression hearing commenced, the Sixth Amendment's guarantee of openness should have applied. It would clearly be arbitrary to restrict the Sixth Amendment's public trial right to events which transpire before

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[15] See also *Levine* v. *United States,* 362 U.S. 610, 616 (1960) (due process requires "appropriate regard for the requirements of a public proceeding" in "all adjudications through the exercise of the judicial power"), quoted in *Richmond Newspapers, Inc.* v. *Virginia,* 448 U.S. 555, 574 (1980) (plurality opinion of Burger, C.J.).

[16] In *Gannett* this Court held that "the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor the press an enforceable right of access to a *pre*trial suppression hearing." *Richmond Newspapers, supra,* 448 U.S. at 564 (opinion of Burger, C.J.). The Court did not decide whether the Sixth Amendment guarantees the *accused* a right to open suppression hearings, whether held before or during the trial.

[17] See, *e.g., United States ex rel. Bennett* v. *Rundle,* 419 F.2d 599, 606 (3d Cir. 1969) (suppression hearing which took place after the jury was empanelled "falls within the constitutional guarantee that in criminal prosecutions all trials should be public"). See also *United States* v. *Clark,* 475 F.2d 240, 244-48 (2d Cir. 1973) (right to public trial extends to suppression hearings, without regard to whether "trial" has begun). See generally *Gannett, supra,* 443 U.S. at 431-32 n.11, 436 (Blackmun, J., concurring in part and dissenting in part). Once the jury was empanelled, jeopardy attached. See, *e.g., Chatham* v. *State,* 247 Ga. 95, 96, 274 S.E.2d 473, 473-74 (1982).

a jury or to proceedings at which the trier of fact specifically considers guilt or innocence.[18] Rather, as it has in applying the closely analogous right of access under the First Amendment, see *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 605 (1982), this Court, in determining the applicability of the Sixth Amendment right of openness to a particular type of criminal proceeding, should look both to the manner in which such proceedings historically have been conducted, and to the role that openness plays "in the functioning of the judicial process and the government as a whole." *Id.* at 605-06. See also *Clark, supra*, 475 F.2d at 246-47; *Rundle, supra*, 419 F.2d at 605-06.

A history of openness is significant in constitutional terms "not only 'because the Constitution carries the gloss of history,' but also because 'a tradition of accessibility implies the favorable judgment of experience.'" *Globe Newspaper Co., supra*, 457 U.S. at 605.[19] To be sure, suppression hearings were unknown at common law; the exclusionary rule was announced,[20] and applied to the States,[21] well after the Constitution was adopted. See *Gannett, supra*, 443 U.S. at 395-96 (Burger, C.J., concurring). It is nonetheless true that even *pre*-trial suppression hearings have traditionally been open. *Gannett*, 443 U.S. at 430-32 n.11 (Blackmun, J., concurring in part and dissenting in part). And where closure of comparable pretrial proceedings has been permitted it has generally been *only* at the request of the defendant. *Id.* at 390-91.[22]

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[18] There is no automatic requirement, of course, that suppression hearings be held outside the presence of the jury. See *Pinto* v. *Pierce*, 389 U.S. 31, 32-33 (1967) (*per curiam*).

[19] Quoting *Richmond Newspapers, supra*, 448 U.S. at 589 (Brennan, J., concurring in judgment).

[20] *Boyd* v. *United States*, 116 U.S. 616 (1886).

[21] *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

[22] See, *e.g.*, Commissioners on Practice and Pleadings, *Code of Criminal Procedure* 95 (Final Report 1850), quoted in *Gannett, supra*, 443 U.S. at 390 n.22 ("To guard the rights of the defendant against a secret examination, the [Field Code] provides that [pretrial proceedings] shall not be conducted in private, unless at his request."). See also *State* v. *Williams*, 93 N.J. 39, 459 A.2d 641, 649-50 & n.5 (1983) (public pretrial criminal proceedings have traditionally been the "near uniform practice in the federal and state court systems") (collecting authorities).

(footnote continues)

This "favorable judgment of experience" is confirmed by an analysis of the Sixth Amendment values promoted by open suppression hearings. For as a majority of the Court has recognized, suppression hearings are "close equivalents" of trials and "implicate all the policies that require that the trial be open to the public." *Gannett, supra,* 443 U.S. at 436 (Blackmun, J., concurring in part and dissenting in part); *id.* at 397 n.1 (Powell, J., concurring). "In view of the special significance of a suppression hearing, the public's interest in this proceeding often is comparable to its interest in the trial itself." *Id.* And the guarantee of open criminal *trials,* as the Court has stated,

> "plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government."

Globe Newspaper, supra, 457 U.S. at 606 (footnotes omitted). See also *Gannett, supra,* 443 U.S. at 427-33 (Blackmun, J., concurring in part and dissenting in part).

(footnote continued)

As the Court noted in *Gannett,* the rationale for a lack of a *public* right of access to pretrial proceedings in general and pretrial suppression hearings in particular is the fear of prejudicing potential jurors and the need to protect the defendant's right to a fair trial. *Gannett, supra,* 443 U.S. at 390 n.20. This fear is obviated where, as here, it is the defendant who insists on public proceedings and a jury has been empanelled and the jurors instructed not to discuss the case among themselves or with others and not to read or view press accounts of the matter. (T.238-40, 293-94.) See also *Richmond Newspapers, supra,* 448 U.S. at 581 (plurality opinion). In any event, protecting the fair trial rights of petitioners or any other defendants was not among the reasons cited by the trial court as justifying closure. Nor does the record in this case reflect any such danger from conducting the suppression hearing in public.

Clearly a suppression hearing is "often as important as the trial which may follow." *Gannett, supra,* 443 U.S. at 397 n.1 (Powell, J., concurring). Roughly 85 percent of all criminal prosecutions are terminated before trial. *Id.* at 397 (Burger, C.J., concurring). Indeed, the suppression hearing may be the *only* major proceeding in a criminal prosecution. *Id.* at 434 (Blackmun, J., concurring in part and dissenting in part). The evidence whose use is at issue may be the most compelling—perhaps the only—evidence of guilt possessed by the State. If the evidence is suppressed, the State may be forced to terminate the prosecution, or improve its plea offer; if the evidence is not suppressed the defendant may well plead guilty. See *id.* Thus, openness is essential precisely because, when a suppression hearing is held, "there is no certainty that a trial will take place." *Id.* at 397 (Burger, C.J., concurring). See also *United States* v. *Cianfrani,* 573 F.2d 835, 850 (3d Cir. 1978).

Moreover, suppression hearings are structurally identical to trials-in-chief and thus derive the same benefits from publicity —such as inducing witnesses to come forth, promoting the conscientiousness of the participants, deterring perjury, and, most important from the defendant's point of view, checking the abuse of prosecutorial and judicial power. *Gannett, supra,* 443 U.S. at 434 (Blackmun, J. concurring in part and dissenting in part). See also *Rundle, supra,* 419 F.2d at 605. Indeed, the value of publicity as a check on abuses by both law enforcement and judicial officials is nowhere greater than in suppression hearings. By definition, suppression hearings arise out of charges of serious misconduct by law enforcement officials, misconduct which has allegedly resulted in the infringement of important civil rights. Both for society and for the defendant, it is critical to ensure that such allegations are fully aired and fairly resolved without even the appearance of collusion or connivance among law enforcement and judicial officials.

This case dramatically illustrates the policies that open suppression hearings serve. The police, at the behest of the local prosecutor, with the assistance of the local telephone company and the concurrence of a local judge, conducted an eight-month wiretapping operation covering 40 different tele-

phones and resulting in the recording of over 800 hours of private conversations. The information gathered as a result of the electronic surveillance was then utilized as the basis for warrants authorizing raids of more than 150 homes and wholesale seizures of private property. Among the materials seized were many boxes of concededly "personal" materials, many of them implicating important First Amendment interests. Cf. *Stanford* v. *Texas,* 379 U.S. 476, 485 (1965).

The defense protested both the authority for this general search and the manner in which it was conducted. In the process, it challenged the conduct not only of the police but of telephone company officials, the prosecutor, and the judge, all of whom testified at length at the suppression hearing, and were subjected to vigorous cross-examination. Had not these defendants gone to trial, the closure of the suppression hearing might have kept these facts from public view entirely, for if the case had been dropped or if the defendants had entered pleas, no record might ever have been prepared. See *Gannett, supra,* 443 at 434-35 (Blackmun, J., concurring in part and dissenting in part); *Cianfrani, supra,* 573 F.2d at 850. Especially where, as here, one of those whose conduct is questioned is the judge who issued the warrants, it is important to afford visible assurance that the court conducting the suppression hearing has given the allegations of misconduct full and fair consideration. See generally *Sheppard* v. *Maxwell,* 384 U.S. 333, 350 (1966); *In re Oliver,* 333 U.S. 257, 270 (1948).

Closure erodes the public's confidence in the administration of justice, offending "the fundamental, natural yearning to see justice done." *Richmond Newspapers, supra,* 448 U.S. at 571 (opinion of Burger, C.J.). Closure of the only substantial public event in many criminal proceedings prevents the judicial system from satisfying that yearning because, if reached in secrecy, a "result considered untoward may undermine the public confidence." *Id.* And "where the [proceeding] has been concealed from public view, an unexpected outcome can cause a reaction that the system has at best failed and at worst has been corrupted." *Id.* This interest in public confidence is of acute significance to the accused: Where the public is deprived

of facts concerning the course justice is taking, "natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self-help'" directed against those who are freed, *id.*, thus nullifying their rights to due process and fair trials.[23]

Because the exclusionary rule is a rule whose function is to serve the "imperative of judicial integrity," *Richmond Newspapers, supra,* 448 U.S. at 594 n.19 (Brennan, J., concurring in judgment), openness is all the more important. Whatever the merits of the rule itself, depriving the public of a full understanding of the balance struck in each case must inevitably jaundice the public's perception of the functioning of the criminal justice system. "One of the demands of a democratic society is that the public should know what goes on in its courts . . . to the end that the public may judge whether our system of criminal justice is fair and right." *Maryland* v. *Baltimore Radio Show,* 338 U.S. 912, 920 (1950) (opinion of Frankfurter, J., respecting denial of certiorari). Both for those who believe that the exclusionary rule is ill-conceived, and for the rule's defenders, open suppression hearings can only be regarded as a virtue: Without open proceedings debate over the wisdom of the rule cannot be informed. Cf. *Whitney* v. *California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

For all these reasons, this Court should hold that the Sixth Amendment guarantee of open criminal proceedings encompasses suppression hearings, whether conducted after "the trial" formally commences—as here—or before.[24]

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[23] Acceptance of the state's monopoly, through the criminal law, over the legitimate use of force, see *Ogden* v. *Saunders,* 25 U.S. (12 Wheat.) 213, 346-47 (1827) (Marshall, C.J., dissenting), is possible only when the public is allowed to satisfy itself that each actor has properly discharged his role in the "theatre of justice." 1 J. Bentham, *The Rationale of Judicial Evidence* 597 (J. Mill ed. 1827).

[24] Such a holding would not, of course, imply that the Sixth Amendment automatically would apply with equal force to each of the many "incidental or collateral" discussions or proceedings held outside the presence of the jury before or during trial. See *Richmond Newspapers, supra,* 448 U.S. at 598 n.23 (Brennan, J., concurring in judgment) (when trial courts conduct "inter-

(footnote continues)

B. The Trial Court Erred in Closing the Suppression Hearing Below in the Absence of any Particularized Determination or Evidence that Closure Was Necessary To Protect the Interests Said To Justify It.

This Court has never decided precisely what showing is necessary to close a criminal proceeding over the *objection* of the accused. In *Gannett*, four Members of the Court did declare that, *upon the request of the accused*, the Sixth Amendment's public trial guarantee might be overcome only upon a showing that (1) "there is a substantial probability that irreparable damage to [a compelling interest] will result from conducting the proceeding in public"; (2) there is "a substantial probability that alternatives to closure will not protect adequately [the asserted interest]"; and (3) "there is a substantial probability that closure will be effective in protecting against the perceived harm." 443 U.S. at 441-42 (Blackmun, J., concurring in part and dissenting in part). Cf. *Nebraska Press Ass'n, supra*, 427 U.S. at 562 (similar standard for gag order). No less strict a test should be applied when closure is sought, as here, *over the defendant's objection.*

Similarly, the Court has held that, in light of the the public's First Amendment right of access to criminal trials, a trial may not be closed *even at the request of the accused*, unless that closure "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper, supra*, 457 U.S. at 606-07.[25] See also *Richmond Newspapers, supra*, 448 U.S. at 581 (opinion of Burger, C.J.) (closure forbidden "[a]bsent an overriding interest articulated in findings," that cannot be served through less restrictive alternatives). Again, no less stringent showing should be

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(footnote continued)

changes at the bench," open trial guarantee does not require public or press "intrusion upon the huddle"). See also *Rundle, supra*, 419 F.2d at 605 (specifying "incidental or collateral discussions outside the presence of the jury" that need not be open to public). Cf. *Gannett, supra*, 443 U.S. at 397 n.1 (Powell, J., concurring) ("arguments, consultations and decisions . . . not central to the process" implicate no First Amendment rights).

[25] Citing *Brown* v. *Hartlage*, 456 U.S. 45, 53-54 (1983); *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 101-03 (1979); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

required where, as here, an accused *demands* an open proceeding and objects to closure. See *Douglas* v. *Wainwright*, 714 F.2d 1532, 1539 (11th Cir. 1983), *cross-petitions for certiorari filed*, Nos. 83-817 & 83-995.[26]

No such showing was made, or could have been made, to justify the closure order entered below.

The sole basis for the closure order in this case was the State's conclusory assertion that it "must" use "evidence derived from court-authorized electronic surveillance," which might "involve" the "privacy expectations" of non-defendants, in order to "validate" the seizure of other evidence that the State proposed to use. (J.A.6a.) Both the State and the trial court expressed the belief that disclosure of such evidence for this purpose in open suppression proceedings would constitute an "unnecessary publication" and "an unlawful invasion of privacy" which would render the evidence inadmissible under the Georgia RICO statute, O.C.G.A. § 16-1164(b)(8), in criminal prosecutions of persons other than those on trial.[27]

On appeal, the Georgia Supreme Court declined to reach the question of whether the Georgia RICO statute "required that the wiretap information be revealed only in a closed courtroom." (J.A.23a, 303 S.E.2d at 441.)[28] Instead, the

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[26] At least where, as here, a contemporaneous objection is made, closure may not be effected in the absence of a hearing on the issue and findings articulated in the record by the trial court as to the need for closure, the lack of less restrictive alternatives, and the efficacy of closure. *Gannett, supra*, 443 U.S. at 445-46 (Blackmun, J., concurring in part and dissenting in part); *id.* at 400-01 (Powell, J., concurring); *United States* v. *Brooklier*, 685 F.2d 1162, 1171 (9th Cir. 1982); *United States* v. *Criden*, 675 F.2d 550, 559-62 (3d Cir. 1982). *Cf. United States* v. *Chagra*, 701 F.2d 354, 364-65 (5th Cir. 1983). The failure of the trial judge to make and articulate any of the requisite findings constitutes an independent ground for reversal.

[27] O.C.G.A. § 16-11-64(b)(8) is set out at page 6, note 6, above.

[28] The fact that, as a matter of state law, the prosecution would be disabled from later using wiretap evidence in open court against the defendants, or against others not presently on trial, would not by itself give rise to a state "interest" justifying closure, for a state law precluding the use of such evidence unless played in closed proceedings would itself have to be measured against the Constitution's guarantees of openness. Whether state law so provides in Georgia is an issue not decided by the Georgia Supreme Court and is not before this Court.

appellate court concluded that the trial court had permissibly "balanced" the "privacy rights of others" against petitioners' "rights to a public hearing." (*Id.*) But whatever privacy interests were conceivably at stake here, they could not justify closure of this suppression hearing.

First, whether or not closure may *ever* be required to protect the privacy interests of other parties, such privacy interests could not possibly extend *beyond* those portions of the proceeding devoted to revealing the contents of the wiretap information. See, *e.g.*, *Cianfrani, supra,* 573 F.2d at 857. Yet the trial court in this case did not simply close the courtroom for the two-and-one-half hours during which the State's tapes were played; the entire seven-day suppression hearing was closed. There cannot be any doubt that total closure was unjustified.

Second, assuming that the State's request to use its evidence implicated substantial privacy interests, and that partial closure might thus have been warranted, the issue was whether, *on the facts of this case,* whatever infringement of privacy was threatened by the playing of recorded conversations in open court at the suppression hearing was serious enough to override the right to open proceedings. The trial court's closure order, however, amounts to a flat rule that, in a suppression hearing, privacy interests must *always* prevail.

Such *per se* rules are virtually never permissible in this context; this Court in *Globe Newspaper, supra,* made clear that closure requests should be "determine[d] on a case-by-case basis." 457 U.S. at 609. Thus, at a minimum, the trial court should be required to make an assessment of the weight of the privacy interests at stake in a given case, based on such factors as the nature of the recorded conversations, the willingness of the parties to the conversations to consent to the disclosure of the contents, and the degree to which the recordings have

already been—or will be—lawfully disseminated. The trial court should also be required to consider alternatives to closure.[29]

The trial court here acted only on the State's cryptic claim that the intercepted conversations might "involve" "privacy expectations" of others—hardly a sufficient showing—and made no particularized finding of justification or necessity. Nor could the required finding of efficacy have been made here in any event, for transcripts of the suppression hearing—including transcripts of the tapes played by the State—were themselves made public. See *Globe Newspaper, supra,* 457 U.S. at 610.

The Georgia Supreme Court apparently perceived two additional interests at stake that justified closure—"harm to others" and "prejudice to other defendants" (J.A.23a, 303 S.E.2d at 441)—but the trial court identified no such interests as justifications for closure *in this case,* and the appellate court did not specify what it had in mind. The Georgia Supreme Court purported to discern "harm" and "prejudice" to others in the evidence "revealed" at the suppression hearing. It was, of course, improper to assess the constitutionality of the closure order on the basis of what transpired *after* the order was issued, rather than on the record before the trial court when it ruled. Even if the possibility of such injury had been asserted *before* closure, a vague and unsupported assertion that unidentified persons might in some unspecified fashion be "harmed" or "prejudiced" could not without more constitute a sufficient justification for closure. There was no evidence before the trial court indicating that failure to close the suppression hearing would in fact cause any such injuries.

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[29] It has been suggested that, where public disclosure is to be avoided, trial courts use headphones to listen to the tapes or secure prehearing agreements to limit the references to the actual contents of any private communications. See *Gannett, supra,* 443 U.S. at 445 (Blackmun, J., concurring in part and dissenting in part); *Cianfrani, supra,* 573 F.2d at 858-59 (discussing "wide variety" of alternatives even to limited closure). Indeed, a trial court has considerable discretion in deciding whether to permit the use of such evidence at all, and may exclude evidence upon determining that it is purely cumulative, or unduly prejudicial to the accused.

C. Closure of the Suppression Hearing also Violated the First Amendment.

Although primary reliance has been placed here on the Sixth Amendment public trial right, the closure order issued by the trial court also clearly violated the First Amendment. The considerations justifying open suppression hearings under the Sixth Amendment also justify openness under the First Amendment. See, *e.g., Globe Newspaper, supra,* 457 U.S. at 603-606; *Richmond Newspapers, supra,* 448 U.S. at 564-78 (opinion of Burger, C.J.); *Gannett, supra,* 443 U.S. at 397-401 (Powell, J., concurring). [30]

Petitioners' own First Amendment rights were denied because closure precluded them from availing themselves of the "important educative role" that open judicial proceedings can serve, *Gannett, supra,* 443 U.S. at 428 (Blackmun, J., concurring in part and dissenting in part)—that is, from creating public awareness of their own plight, and of the egregious law enforcement practices used here.

Moreover, in protesting closure, petitioners assert not only their own rights but those of the public, whose right of access is indisputably implicated. Petitioners have standing to assert the public's First Amendment right of access because, at least in some cases, no representatives of the public may be aware of—or, for any number of reasons, willing to challenge [31]—an attempt to close the proceedings. Thus, the accused may be the only available champion of the public's right to open suppression hearings. See, *e.g., Doe* v. *Bolton,* 410 U.S. 179, 188-89 (1973); *Griswold* v. *Connecticut,* 381 U.S. 479, 481 (1965). Cf. *NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449, 459 (1958).

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[30] State and lower federal courts have applied the First Amendment to bar closure of suppression hearings in a wide number of cases. See, *e.g., Brooklier, supra,* 685 F.2d at 1171; *Criden, supra,* 675 F.2d at 559-62; *United States* v. *Edwards,* 430 A.2d 1321 (D.C. Ct. App. 1981), *cert. denied,* 455 U.S. 1022 (1982); *Richmond Newspapers, Inc.* v. *Commonwealth,* 22 Va. 574, 281 S.E.2d 915 (1981); *Buzbee* v. *Journal Newspapers, Inc.,* 297 Md. 68, 465 A.2d 426 (1983). See also *Chagra, supra,* 701 F.2d at 364-65.

[31] The closure of the suppression hearing in this case was in fact protested by Atlanta Newspapers, Inc., although the paper did not appeal the closure order.

II. The Evidence on Which Petitioners' Convictions Were Based Should Have Been Suppressed Because the General Search Undertaken of Their Homes, and the Wholesale Seizure of Their Property and Papers, Without Particularized Warrant or Probable Cause, Violated the Fourth Amendment.

A. The Statute Is Unconstitutional on Its Face.

The record in this case makes clear that at least some of the property was seized by the police on the view that such seizures were authorized by O.C.G.A. § 16-14-7(f), and *not* by the warrants.[32] Section 16-14-7(f) provides that property may be seized without prior judicial approval where (1) the police have "probable cause to believe the property is subject to forfeiture"; (2) the seizure is "incident to a lawful arrest, search, or inspection"; and (3) "the officer has probable cause to believe the property . . . will be lost or destroyed if not seized." Section 16-14-7(f) is facially invalid both because the definition of "property subject to forfeiture" is, on its face and as construed, so broad as to empty the "probable cause" requirement of all meaning, and because, even if the definition of forfeitable property enabled the police to identify it on mere observation, the State is forbidden to authorize seizure of

[32] See T.600 (testimony of State's witness that seizure of "personal and private records" was made "under the R.I.C.O. statute," and "not . . . the order."). See also T.879, 881-82 (describing post-raid seizure of petitioner W.B. Burke's car "under the R.I.C.O. statute," in absence of warrant or seizure order).

The trial court's refusal to pass on the validity of the search warrants and the lawfulness of the searches and seizures pursuant thereto must be treated as a determination that Section 16-14-7(f) authorizes warrantless entry into a person's home, an indiscriminate search of the premises, and wholesale seizures of private property. As noted above, the Georgia Supreme Court held that seizures under Section 16-147(f) must be incident to a *lawful* arrest, search, or "inspection"; it did not, however, reverse the convictions of the petitioners with directions to the trial court to assess the validity of the search warrants and the lawfulness of the seizures made pursuant thereto. Accordingly, even if the Court rejects the particularity and probable cause arguments petitioners raise here, the judgments below must nonetheless be vacated to permit assessment of petitioners' challenge, not passed on by the courts below, that the warrants, the entry, and any seizures pursuant to the warrants, were—even apart from those pursuant to the RICO statute—invalid.

lawfully held property without prior judicial approval and without notice or hearing.

Under Georgia Code § 16-14-7(a), "[a]ll property of every kind used or intended for use in the course of, derived from, or realized through a pattern of racketeering activity is subject to forfeiture to the state." As one federal district court has recognized, that definition includes at least "all property, of whatever nature and no matter how inoffensive, if it is acquired with racketeering proceeds." *Western Business Systems, Inc.* v. *Slaton,* 492 F. Supp. 513, 514 (N.D. Ga. 1980). Such property "might be anything from gardening equipment to cook books." *Id.*[33] The wholesale seizures that occurred in this case in anticipation of criminal proceedings and parallel civil forfeiture actions—where the police, in the words of the trial court, "just went in and took everything in sight" (S.T.638)—vividly illustrate the scope of authority to seize private property that the police understand Section 16-14-7(f) to confer.

Because "property subject to forfeiture"—*e.g.,* property acquired with racketeering proceeds—could literally include *anything,* police are simply incapable of making "probable cause" determinations sufficiently meaningful to justify seizure of property without prior judicial approval. The "probable cause" required by the Fourth Amendment is " 'probable cause to *associate* the property with criminal activity.' " *Texas* v. *Brown,* 103 S. Ct. 1535, 1540 (1983) (plurality opinion of Rehnquist, J.) (emphasis added).[34] As Justice Rehnquist has observed, probable cause "requires that the facts available to the officer . . . 'warrant a man of reasonable caution in the belief,' . . . that [the items sought to be seized] may be contraband or stolen property or useful as evidence of a crime."

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[33] Cf. *Russello* v. *United States,* 104 S. Ct. 296, 299-303 (1983) (broadly construing illegal "interest" under federal RICO statute, 18 U.S.C. § 1963(a)(1), to include fire insurance payments for arson damage to property caused by conduct of petitioner in violation of RICO). Under the federal RICO statute, property subject to forfeiture may not be seized prior to conviction, although a court may enjoin its disposition or use pending the outcome of forfeiture proceedings. See 18 U.S.C. §§ 1963(b) & (c), 1964(a).

[34] Quoting *Payton* v. *New York,* 445 U.S. 573, 586-87 (1980).

Id. at 1543.[35] "There must," this Court has made clear, "be a *nexus* . . . between the item to be seized and *criminal* behavior." *Warden* v. *Hayden*, 387 U.S. 294, 307 (1967) (emphasis added).[36]

The property authorized to be seized by Section 16-14-7(f) has no "distinctive character" that could support such a belief or disclose such a nexus, much less a character that speaks "volumes . . . to the trained eye of the officer." *Brown, supra*, 103 S. Ct. at 1543 (plurality opinion).[37] In contrast to such property as the uninflated, tied-off balloons at issue in *Brown*, there is nothing "clearly . . . incriminating" about "property subject to forfeiture," see *Washington* v. *Chrisman*, 455 U.S. 1, 6 (1982),[38] and an officer's identification of particular property as "subject to forfeiture" is therefore bound to be "mere speculation." *United States* v. *White*, 660 F.2d 1178, 1182 (7th Cir. 1981). Unless the property bears some legend explicitly identifying it as having been acquired through proceeds from "a pattern of racketeering activity," a police officer simply could not have "probable cause to suspect that the item is connected with criminal activity." *Illinois* v. *Andreas*, 103 S.Ct. 3319, 3324 (1983). Section 16-14-7(f)'s probable cause proviso is therefore nothing more than "a teasing illusion," *Edwards* v. *California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring), a purely nominal protection helpless to safeguard against wholesale seizures of the sort that occurred here.

Interposition of the judicial process is required to ensure that there is probable cause to believe that the property sought to be seized *is* " subject to forfeiture," and that it is located at the place to be searched. Both findings are critical to implement the central Fourth Amendment requirement that items to be seized be particularly described in order to limit the exercise of discretion by police officers. See *Stanford* v. *Texas*, 379 U.S.

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[35] Quoting *Carroll* v. *United States*, 267 U.S. 132, 162 (1925).

[36] See also *Ybarra* v. *Illinois*, 444 U.S. 85 (1979) (no automatic "probable cause" nexus between bar patrons and bar for which probable cause warrant had issued).

[37] See *id.* at 1545 (Powell, J., concurring in judgment).

[38] Citing *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Harris* v. *United States*, 390 U.S. 234 (1968).

at 485-86.[39] Because Section 16-14-7(f) places virtually no limit on the type of property that an officer might believe is "subject to forfeiture" (contrast *Andresen* v. *Maryland*, 427 U.S. 463, 480-81 (1976)), it is constitutionally imperative to interpose a magistrate's determination, based on *genuine* probable cause, to assure that seizures under Georgia's RICO statute are not the wholesale seizures condemned by the Framers.[40]

Even if "property subject to forfeiture" were self-revealing, without prior judicial approval the State may not, under the Fourth Amendment, seize property lawfully held—property that is neither stolen nor the fruit, instrumentality, or evidence of a crime. What Georgia has attempted to do here is impermissible —to expand the categories of property subject to seizure without warrant beyond those established by this Court: The State here has authorized property to be seized without a constitutionally sufficient "nexus" to criminal behavior. *Warden* v. *Hayden, supra*, 387 U.S. at 307. Little would remain of the Fourth Amendment's protections if any property that might have been purchased with ill-gotten gains could be seized without prior judicial approval as "fruit" or "evidence" of the crime.

Seizure without notice or hearing of lawfully held property that is neither the fruit, instrumentality, nor evidence of a crime would violate not only the Fourth Amendment but due process

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[39] This case is unlike those involving searches under warrants for certain stolen property that is not self-revealing, or warrantless seizures under the "plain view" doctrine for property that an officer has probable cause to believe is stolen. Probable cause for seizure exists with respect to such property either when the police know that particular property has been stolen, or when police come upon property that *must* have been stolen because such property obviously does not belong where it is found. The fact that such property may, by itself, be innocent does not save it from seizure not simply because it is unlawfully held but because there is independent reason to associate it with criminal activity. In each case, something about the particular item of property links it to a crime. Nothing about "property subject to forfeiture" on the face of it reveals any such connection.

[40] See *Stanford* v. *Texas, supra*, 379 U.S. at 481-85. The origin and meaning of the particularity requirement is described at length in the brief of the American Civil Liberties Union as *amicus curiae* in *Ins* v. *Delgado*, No. 82-1271, at pp. 13-22.

as well. This case does not present "an 'extraordinary situation' [justifying] postponement of notice and hearing until after seizure." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974) (indicating that, absent "extraordinary situation," notice and hearing is required for seizure even of property used for unlawful purposes). In conducting wholesale seizures of petitioners' property, the police had no basis for determining here that "pre-seizure notice and hearing might frustrate the interests served by the statute[ ]." *Id.* at 679. The police had no basis for believing that any of the "property subject to forfeiture" "[w]ould be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given."[41] *Id.* Thus, "[b]ecause the official seizures [were] carried out without notice or hearing or other safeguard against mistaken [seizure]," they violated the Fourteenth Amendment. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 606 (1975). For all of these reasons, the statute is invalid on its face.

B. The Seizures Below Violated the Fourth Amendment.

Wholly apart from the issue of their validity under Section 16-14-7(f), the seizures here must be tested directly against the Fourth Amendment. See, *e.g.*, *Ybarra* v. *Illinois*, 444 U.S. 85 (1979); *Stanford* v. *Texas*, 379 U.S. 476 (1965). So measured, they plainly fail to pass constitutional muster; it is clear that no valid warrant could have authorized the general searches and wholesale seizures performed below. A warrant describing everything in a house would be precisely the general warrant that the Fourth Amendment was designed to prevent. See *Entick* v. *Carrington*, [1765] St. Tr. 1030.[42]

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[41] See also *United States* v. *Eight Thousand Eight Hundred & Fifty Dollars*, 103 S. Ct. 2005, 2011 n.12 (1983) (reaffirming test of *Calero-Toledo*); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981) (exception to requirement for hearing may be justified in "emergency situations").

[42] Petitioners, who in the trial court had attacked the validity of the warrants, and the searches and seizures performed thereunder, renewed their attack in the Georgia Supreme Court, asserting that the warrants had been executed in bad faith, as part of "a pre-search plan to search for and seize anything that the executing officers, in their sole and unbridled discretion, felt

(footnote continues)

C. All of the Evidence Seized Should Have Been Suppressed.

Under this Court's decision in *Stanford* v. *Texas*, 379 U.S. 476 (1965), it is irrelevant in determining the validity of a search and seizure that *some* of the items seized were described in the warrant with sufficient particularity, if the warrant "was of the kind which it was the purpose of the Fourth Amendment to forbid—a general warrant." *Id.* at 480. By the same token, the fact that a warrant, on its face, satisfies the Fourth Amendment's particularity requirement can make no difference on a motion to suppress if the police have *treated* the warrant —or statute—as license for a general search of a person's home and wholesale seizure of his papers and effects. This is so especially when among the things seized are, as here, the most personal and confidential communications of the victims of the searches.

In such circumstances, the proper remedy must be suppression of all property seized, including property within the literal scope of the warrant, as if the warrant itself had on its face authorized the general search. As several circuit courts have acknowledged, "flagrant disregard for the limitations in a warrant [may] transform an otherwise valid search into a general one, thereby requiring the entire fruits of the search to be suppressed." *United States* v. *Heldt*, 668 F.2d 1238, 1259 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982).[43] Application of such a rule is necessary where, as here, the record establishes that the police "did not confine their search in good faith to the objects of the warrant, and that while purporting to

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(footnote continued)

might be evidence of the targets' assets against which forfeiture actions might be brought." (Appellants' Response to Appellees' Jurisdictional Challenge, p. 3.) Petitioners made clear their position that the searches had been indiscriminate and the seizures wholesale, in defiance of basic Fourth Amendment guarantees. (*E.g.*, Brief of Appellants, p. 10.) These challenges, however—like those presented to the trial court—fell on deaf ears in the court below.

[43] See, *e.g.*, *United States* v. *Tamura*, 694 F.2d 591, 597 (9th Cir. 1983); *United States* v. *Wuagneux*, 683 F.2d 1343, 1354 (11th Cir. 1982), *cert. denied*, 104 S. Ct. 69 (1983).

execute it, they substantially exceeded any reasonable interpretation of its provisions." *United States* v. *Rettig*, 589 F.2d 418, 423 (9th Cir. 1978).[44]

Nothing short of blanket suppression will serve to deter—or adequately to redress—the Fourth Amendment violation worked when the police "use a seemingly precise warrant only as a ticket to get into a man's home, and, once inside, . . . launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant." *Stanley* v. *Georgia*, 394 U.S. 557, 572 (1969) (Stewart, J., concurring in result). Even assuming that the warrants here were otherwise valid, therefore, the entire fruit of the raids should have been suppressed.[45]

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[44] In *Rettig*, the Ninth Circuit held that, although the warrant issued by the state court judge there "was not a general warrant on its face," 589 F.2d at 418, "all evidence seized during the search must be suppressed." Writing for the court, Circuit Judge Kennedy explained that, "[a]s interpreted and executed by the agents, the warrant became an instrument for conducting a general search," and, "[u]nder the circumstances, it is not possible . . . to identify after the fact the discrete items of evidence which would have been discovered had the agents kept their search within the bounds of the warrant." *Id.*

[45] To hold that damage actions under 42 U.S.C. § 1983 would afford sufficient redress for such wholesale violations of Fourth Amendment and due process rights would sanction cynical pay-as-you-go law enforcement, in which the possibility of damages is deemed simply a "cost" of "fighting crime." Cf. *City of Los Angeles* v. *Lyons*, 103 S. Ct. 1660, 1683-84 (1983) (Marshall, J., dissenting). Moreover, such a remedy would be unlikely to afford full redress for the simple reason that *post hoc* inquiry into the reasonableness of a search and seizure is likely to be rather forgiving. See Stewart, "The Road to *Mapp* v. *Ohio* and Beyond," 83 *Colum. L. Rev.* 1365, 1386-89 (1983). See also *Torres* v. *Puerto Rico*, 442 U.S. 465, 474 (1979) ("[W]e have not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement.").

CONCLUSION

For the foregoing reasons, the convictions of the petitioners should be reversed.

Respectfully submitted,

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